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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-5804

CHRISTOPHER BURROUGHS,

Petitioner

v.

STATE OF GEORGIA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

DARYL A. ROBINSON
Assistant
Attorney General

Please serve:

DARYL A. ROBINSON
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

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QUESTION PRESENTED

I.

Does prosecution for violation of a municipal ordinance and a violation of state law, each determined by the Supreme Court of Georgia to be a separate offense requiring proof of different elements, contravene federal constitutional prohibitions against double jeopardy?

STATEMENT OF THE CASE

Petitioner, Christopher Burroughs, was convicted of disorderly conduct[1/] in Atlanta Municipal Court. Thereafter, Burroughs was convicted in State Court of Fulton County of the offense of simple battery [2/] and refusal to disperse.[3/] The evidence giving rise to these convictions showed "that Burroughs and some friends were gathered on the street, that Burroughs refused to leave when asked to do so by a police officer and that he then hit and kicked the police officer." State v. Burroughs, 244 Ga. 288, ___S.E.2d___ (1979).

Petitioner moved to dismiss the proceedings in State Court of Fulton County on statutory and constitutional double jeopardy grounds. The trial court reserved ruling; following the trial Burroughs' conviction for simple battery was set aside. The state appealed and the trial court's ruling was affirmed by the Georgia Court of Appeals. State v. Burroughs, 149 Ga. App. 183, 254 S.E.2d 144 (1979). The Supreme Court of Georgia granted certiorari and reversed, finding that the two offenses in question were different offenses requiring different elements of proof.

[1/] Section 17-3001.10, Atlanta Code of Ordinances (1977). One "who shall by acts of violence interfere with another's pursuit of a lawful occupation" is guilty of disorderly conduct.

[2/] Ga. Laws, 1968 pp. 1249, 1281 [Ga. Code Ann. § 26-1304]: "A person commits simple battery when he either (a) intentionally makes physical contact of an insulting or provoking nature with the person of another or (b) intentionally causes physical harm to another. A person convicted of simple battery shall be punished as for a misdemeanor."

[3/] Ga. Laws, 1968 pp. 1249-1315 [Ga. Code Ann. § 26-2606]: "A person in a gathering who refuses to obey the reasonable official request or order of a peace officer or fireman to move for the purpose of promoting the public safety by dispersing those gathered in dangerous proximity to a fire or other emergency, is guilty of a misdemeanor.

Burroughs now petitions this Court for a writ of certiorari to review that decision of the Supreme Court of Georgia. State v. Burroughs, supra.

If necessary to address adequately the issue raised in this petition additional evidence will be recounted in subsequent portions of this brief.

REASON FOR NOT GRANTING THE WRIT

I. PROSECUTION FOR VIOLATION OF A MUNICIPAL ORDINANCE AND A VIOLATION OF STATE LAW, EACH DETERMINED BY THE SUPREME COURT OF GEORGIA TO BE A SEPARATE OFFENSE REQUIRING PROOF OF DIFFERENT ELEMENTS, DOES NOT CONTRAVENE FEDERAL CONSTITUTIONAL PROHIBITIONS AGAINST DOUBLE JEOPARDY.

The sole question presented to this Court is whether Petitioner's prosecution for two offenses, determined by the Supreme Court of Georgia to be separate offenses requiring different elements of proof, twice places Petitioner in jeopardy. It does not.

As the Supreme Court of Georgia found, "[b]oth the municipal and state convictions were supported by the same evidence which established that Burroughs and some friends were gathered on the street, that Burroughs refused to leave when asked to do so by a police officer and that he then hit and kicked the police officer." 244 Ga. at 288. Although Petitioner had raised both statutory and constitutional double jeopardy objections, the state supreme court found "that Georgia's double jeopardy statute is inapplicable to successive municipal and state court prosecutions. Where successive municipal and state prosecutions are involved, a criminal defendant's rights are controlled solely by the State and Federal Constitutions." 244 Ga. at 289. Cf. Waller v. Florida, 397 U.S. 387 (1970). The court further found that "a defendant prosecuted in a

municipal court proceeding is in 'jeopardy' in the constitutional sense [citations omitted]." 244 Ga. at 290.

Having so determined, the state supreme court turned its attention to the crucial issue: are the two offenses in question identical or are they separate and distinct offenses? In his brief to this Court, Petitioner asserts that "the state crime is completely subsumed and contained in the city ordinance." (Petitioner's brief, pp. 6-7). This cannot be, for the Supreme Court of Georgia has interpreted state law and determined that the offenses are separate. The court held:

> . . .proof of interference with another's pursuit of a lawful occupation is critical to proof of violation of Section 10 of the municipal ordinance. This element is, however, missing from the offense of simple battery. Simple battery requires proof of either intentional infliction of physical harm to another or intentional offensive contact with the person of another. The requirement of proof of physical harm or of offensive contact is wholly missing from the proof required for disorderly conduct.

244 Ga. at 290-91. As this Court has often recognized, the final authority to interpret state law rests with state courts. See, e.g., Brown v. Ohio, 432 U.S. 161, 167 (1977); Garner v. Louisiana, 368 U.S. 157, 169 (1961).

In Brown v. Ohio, supra, a similar constitutional issue was presented. However, in Brown, the state appellate court "authoritatively defined the elements of the two Ohio crimes"

and determined that one was a lesser included offense. Id. at 167-68. In that regard, contrary to Petitioner's assertion, the same situation was not addressed in Brown; Brown involved a state court determination that even though one offense was a lesser included offense in a second, prosecution for both was proper because the offenses occurred on different dates. This Court held that such a single crime could not be divided into a series of "temporal. . . units." Id. at 169. The present case involves no such situation.

Neither is this case similar to Waller v. Florida, supra. In Waller, this Court held that prosecution in state court is barred when the defendant has been tried in municipal court for the same offense. Id. at 395. That is precisely what the Supreme Court of Georgia held in this case; indeed, that court relied upon Waller in determining that Burroughs had been placed in jeopardy in the federal constitutional sense by his prosecution in municipal court. Brown and Waller are similar to the present case in that each involved a question of double jeopardy; however, neither is dispositive of the issue presented in this petition.

In Blockburger v. United States, 284 U.S. 299, 304 (1932), this Court held:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. . .

The Blockburger test emphasizes the elements of the two crimes. Brown v. Ohio, supra, at 166. "If each requires proof of a fact that the other does not, the Blockburger test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. . ." Brown v. Ohio, supra, at 166, quoting Iannelli v. United States, 420 U.S. 770, 785, n. 17 (1975).

Having determined as a matter of state law that the two offenses were separate offenses requiring different elements of proof, the Supreme Court of Georgia, applying decisions of this Court, found that " ' each provision requires proof of a fact which the other does not'. . .and the two convictions do not impermissibly involve the 'same offense' for federal constitutional purposes." 244 Ga. at 291.

As a matter of state law Petitioner was convicted of separate, distinct offenses; as a matter of state and federal constitutional law Petitioner has not been placed twice in jeopardy.

CONCLUSION

No sufficient reason having been presented, the petition for writ of certiorari should be denied.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

DARYL A. ROBINSON
Assistant
Attorney General

Please serve:

DARYL A. ROBINSON
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

CERTIFICATE OF SERVICE

I, Daryl A. Robinson, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief for Respondent in Opposition upon Petitioner's attorney by depositing a copy of this Brief in the United States mail, with proper address and adequate postage to:

Mr. Lawrence T. Girard
Attorney for Petitioner
Suite 700
Lenox Center
3355 Lenox Road, N. E.
Atlanta, Georgia 30326

This 24th day of January, 1980.

Daryl A. Robinson

DARYL A. ROBINSON